IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ERIC ROBERT LEONARD, Appellant.	No. 33717-7-II UNPUBLISHED OPINION

Bridgewater, J. — Eric Robert Leonard appeals the sentence he received after a jury convicted him of attempted first degree burglary.[1] He argues that the trial court lacked statutory authority to empanel a jury to determine whether he was armed with a firearm at the time of that crime, a fact that resulted in the imposition of a sentencing enhancement. We affirm the firearm

[1] Leonard does not challenge the conviction itself. The jury also convicted Leonard of first degree unlawful possession of a firearm, possession of a stolen firearm, and the gross misdemeanor of making or having burglary tools. Leonard does not challenge either the convictions or the sentences for these crimes. Thus, we do not discuss them further.

enhancement special verdict. Because the State properly concedes that the sentencing court imposed the firearm enhancement term for a class A felony rather than a class B felony and that the sentencing court improperly imposed community custody ex parte, we remand.

By second amended information, the State charged Leonard with attempted first degree burglary. The charging document included a separate special allegation that Leonard was armed with a firearm.

During Leonard's jury trial, the trial court provided the jury with a special verdict form that asked whether Leonard was "armed with a firearm at the time" he committed the attempted burglary. Clerk's Papers (CP) at 112. The trial court instructed the jury that it could not answer affirmatively unless it unanimously agreed beyond a reasonable doubt. Leonard did not object to the court's firearm enhancement instructions or to the court's authority to use the special verdict procedure.

The jury convicted Leonard and answered the special verdict "yes." CP at 112. At sentencing, the trial court imposed the 60-month firearm enhancement required for class A felonies. During the sentencing hearing, the court asked whether it had to impose community custody; the State responded, "No." 3 Report of Proceedings (RP) at 172. The court did not impose community custody, crossing out that portion of the judgment and sentence form. The next day, however, the State moved for an "order correcting" the judgment and sentence under CrR 7.8(a) to add, among other things, imposition of 18 to 36 months of community custody with numerous conditions. The record contains no evidence that the State served Leonard or

otherwise provided notice of this motion.[2] That same day, the court granted the motion; again, the record contains no evidence that Leonard was either present or provided an opportunity to object.[3] Leonard appeals only the sentences the court imposed for his conviction of attempted first degree burglary and the firearm enhancement on that conviction.

Special Verdict Procedure

Leonard first argues that the firearm enhancement is completely invalid because the court submitted the special verdict question to the jury without specific legislative authority. He points out that the legislature specifically required the special verdict procedure for general deadly weapon enhancements, but did not do so in the statute establishing firearm enhancements. *Compare* RCW 9.94A.602 *with* RCW 9.94A.533(3). Relying on the remedy discussion in *State v. Hughes*,[4] Leonard argues that the sentencing court lacked authority to imply or create the special verdict procedure to enhance his sentence.[5]

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[2] For example, there is no proof of service stamp on the face of the motion filed with the sentencing court; neither do the clerk's papers contain a separate certificate of service.

[3] Neither Leonard nor his counsel signed the order prepared by the State. Given that the record contains no transcript of the hearing at which the court signed the order, it appears that the State obtained it at an ex parte proceeding. *See* Br. of Appellant at 8, n.6.

[4] 154 Wn.2d 118, 148-52, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 126 S. Ct. 2546, 2552-53 (2006).

[5] Although we do not reach the merits of this argument, we briefly note that *Hughes* is not the absolute prohibition on judicially implied procedures for imposing sentence enhancements that Leonard claims. In *Hughes*, the court considered the statutory procedure for imposition of exceptional sentences. The legislature had not failed to provide a procedure; it had instead specifically provided that a judge, not a jury, must find the facts to impose such a sentence. *Hughes*, 154 Wn.2d at 148-49, 151. When it declared the legislature's *specified* procedure unconstitutional because a jury must instead find those facts, the court was unwilling to create a

But Leonard did not object to the trial court's special verdict procedure below. Ordinarily, we do not address issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The rules of appellate procedure provide two exceptions (relevant to criminal cases) to this general rule: claims of "lack of trial court jurisdiction" and "manifest error affecting a constitutional right." RAP 2.5(a)(1), (3).

Leonard does not claim the trial court lacked jurisdiction over him, to impose a statutorily authorized firearm sentence enhancement, or to instruct the jury to reach a special verdict. Nor does he claim that the purported error he raises is constitutional. Indeed, his claim is that the trial court chose to avoid constitutional error by making a statutory error instead. That is, he argues that when the court protected Leonard's Sixth Amendment right to jury trial by requiring a special verdict on the facts underlying a possible firearm sentence enhancement, it did so using a method not explicitly prescribed by the statute creating that enhancement.

As framed, this is merely a claim of statutory error, not constitutional error. Leonard failed to preserve this issue and waived any claim of error by failing to object in the trial court; we will not review it on this record.[6]

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procedure completely opposite from that created by the legislature. *Hughes*, 154 Wn.2d at 150, 151-52. Leonard's situation is different, as he does not claim that the legislature created a system inconsistent with that used by the trial court in his case. When "a statute merely is silent or ambiguous" a court may "imply a necessary procedure." *Hughes*, 154 Wn.2d at 151. Moreover, *Hughes* is even narrower, because the court expressly limited its holding to a refusal to create a procedure to convene a new jury *after remand* to determine aggravating facts initially determined by a judge; it did *not* decide "whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." *Hughes*, 154 Wn.2d at 149.

[6] Our holding should not imply that we would have ruled in Leonard's favor on the merits. We are aware of the cases holding that the statute (RCW 9.94A.533(3)) authorizing the firearm

Length of Enhancement

Leonard next argues that the sentencing court improperly imposed a 60-month instead of a 36-month enhancement. We accept the State's concession on this issue. Attempted first degree burglary is a class B felony, not a class A felony. RCW 9A.28.020(3)(b), 52.020(2). The length of firearm enhancements for attempted crimes is based on the reduced class of the attempt, not the higher class of the completed crime. RCW 9.94A.533(3). And the required firearm enhancement for a class B felony is 36 months, RCW 9.94A.533(3)(b); the trial court erred when it instead imposed the 60-month enhancement required for class A felonies. *See* RCW 9.94A.533(3)(a).

enhancement does not *require* a special verdict procedure. *E.g.*, *State v. Olney*, 97 Wn. App. 913, 916-18, 987 P.2d 662 (1999), *overruled on other grounds by State v. Recuenco*, 154 Wn.2d 156, 162 n.2, 110 P.3d 188 (2005), *rev'd on other grounds*, 126 S. Ct. 2546, 2552-53 (2006). But RCW 9.94A.602, the statute requiring a special verdict procedure for the general deadly weapon enhancement, includes firearms in its list of *per se* deadly weapons. Even if it does not *require* a special verdict procedure for a specific firearm enhancement, this statute certainly appears to *allow* such a procedure. *See State v. DeSantiago*, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

Ex Parte Modification of Sentence

Leonard also claims the trial court erred by adding a period of community custody (with numerous mandatory conditions) to his sentence in an ex parte procedure without notice a day after the contested sentencing hearing. The State provides no argument and agrees that remand is necessary. We accept the State's implied concession of error. The court did not merely correct a clerical error under CrR 7.8(a); its imposition of community custody imposed additional punishment. *See State v. Ross*, 129 Wn.2d 279, 285-87, 916 P.2d 405 (1996). The court should have acted only after an adversarial hearing, with notice to both parties. *See State v. Ashcraft*, 71 Wn. App. 444, 463, 859 P.2d 60 (1993)[7]; *State v. Romano*, 34 Wn. App. 567, 568-69, 662 P.2d 406 (1983) (improper for court to have ex parte communications regarding criminal sentencing).

We affirm the jury's special verdict finding that Leonard was armed with a firearm when he committed attempted first degree burglary. We remand for imposition of the correct firearm

[7] "Many decisions of the trial court are discretionary. They should not be made, however, without according the parties an opportunity to provide the court with arguments and authority which bear upon the decision to be made." *Ashcraft*, 71 Wn. App. at 463.

sentence enhancement of 36 months and for an adversarial hearing on the State's proposed sentence modifications, including community custody.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.